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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

Appeal Case No. 2015AP000239-CR
Trial Case No. 2014CM000052

ROBERT C. BLANKENHEIM,

Defendant – Appellant.

STATE'S RESPONSE ON DEFENDANT'S APPEAL FROM OZAUKEE COUNTY CASE NO. 2014CM000052 HONORABLE JOSEPH W. VOILAND CIRCUIT COURT JUDGE PRESIDING OZAUKEE COUNTY, WISCONSIN

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE : FACTS AND PROCEDURAL HISTORY

As respondent, the state exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. [1] Instead, the state will present additional facts in the "Argument" portion of its brief.

ARGUMENT

A. THE DEFENDANT DID NOT BRING A MOTION TO SUPPRESS OR DISMISS ON AN ILLEGAL STOP IN THE CIRCUIT COURT

The defendant argues that the second stop was conducted illegally which requires suppression and dismissal of this and the underlying case.[2] Defendant's argument is forfeited because he never raised it in the trial court. *See* State v. Nelis, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619 ("'It is a fundamental principle of appellate review that issues must be preserved at the circuit court.'") (quoting State v. Huebner, 2000 WI 59 ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727). If issues are not so preserved, an appellate court may consider them forfeited. *See* State v. Kelty, 2006 WI 101, ¶ 18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (noting that loss of appellate review stemming from the failure to assert a right is more properly termed a "forfeiture" of that right rather than a "waiver," which contemplates an intentional relinquishment of the right). "The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. Freytag v. Commissioner of Internal Revenue, 501 U.S. 686, 894-95, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). The rule

[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

[2] The state believes the defendant is referring to the outcome of the Refusal Hearing that was the subject of appellate case no. 15AP000240 which was dismissed on April 8, 2015 for lack of jurisdiction.

promotes both efficiency and fairness, and go[es] to the heart of the common law tradition and the adversary system." *Huebner*, 235 Wis. 2d 486, ¶ 11 (plurality opinion; citations and internal quotation marks omitted). The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. *State v. Erickson*, 227 Wis.2d 758, 766, 596 N.W.2d 749 (1999). It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. *Id.* at 766. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. *Vollmer v. Luety*, 156 Wis.2d 1, 11, 456 N.W.2d 797 (1990). Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. *Freytag*, 501 U.S. at 895, 111 S.Ct. 2631, 115 L.Ed.2d 764; *see also Vollmer*, 156 Wis.2d at 11, 456 N.W.2d 797. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

In this case, defendant by his then attorney Julie J. Flessas file a Notice of Motion and Motion to Suppress for Lack of Probable Cause to Arrest on May 9, 2014. (R 9;R-App 1) Defendant characterizes the motion as a "Motion to Dismiss." (App. Brief page 7) This characterization is inaccurate and misleading as the motion requested suppression for use as evidence at trial all evidence, including but not limited to, all PBR, and/or blood and/or Intoximeter Test Results, field sobriety test results and/or officer notes and verbal and written statements either made by or obtained from, Robert Blakenheim, to police officers or other agents or employees of the State of Wisconsin, the County of Ozaukee, Town of Port Washington, or any other State, governmental unit, subdivision or agency, at the time of or subsequent to Robert Blankenheim first being contacted, seized, and detained by any such person on or about January 29, 2014, all evidence, leads, and other fruits tangible or intangible, derived directly or indirectly there from upon the grounds that the arresting officer lacked reasonable suspicion to stop and probable cause to arrest Robert Blankenheim. (R 9:1;R-App 1) Before this motion could be heard, Mr. Blankenheim fired Attorney Flessas and hired Attorney Paul Bucher. (R 11, 12, & 13) Attorney Bucher made his first appearance on June 3, 2014, (R 42:2 line 8-9;R-App 4). A discussion was held regarding the previous counsel's motion to suppress. Mr. Bucher acknowledged the prior filing and further indicated that he did not believe the motion made sense based on the nature of the charge – operating while revoked. (R 42:3 lines 22-25;R-App 5) Mr. Bucher indicated at that proceeding that he might consider a motion to suppress on the OAR and a motion to dismiss the complaint, but that he would file a new motion that made more sense or adopt the previous counsel's motion. (R 42:4 lines 4-10;R-App 6) Mr. Bucher decided to file his own motion which he did on June 23, 2014, thus abandoning the previously filed motion to suppress. (R 16;R-App 7-13) Despite defendant claiming this was a second

Motion to Dismiss (App. Brief page 7) it was the first and only Motion to Dismiss filed by the defendant. The relief requested in Attorney Bucher's Motion to Dismiss was dismissal of the criminal complaint based on the fact that the original complaint filed by the state failed to set forth in the four corners of the complaint probably cause to believe that the defendant committed the offense of operating while revoked. (R 16;R-App 7-13). The state filed an amended complaint on June 26, 2014 (R19;14-15) which defendant conceded cured any defect complained of in his motion to dismiss and the court denied the motion on July 10, 2014. (see R 46:6-7 lines 22-25 and 1;R-App 16-17)

Accordingly, this court should not entertain the defendant's first issue raised on appeal as it has been forfeited.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN FINDING OFFICER HURDA'S TESTIMONY ABOUT THE CONSENUAL NATURE OF THE SECOND STOP CREDIBILE IS IRRELEVANT

The defendant next claims that the court erred when it found Officer Hurda's testimony regarding the consensual nature of the second stop credible. This argument is irrelevant to the case that is before the court. The hearing held on October 8, 2014, was a two-fold hearing. It was a court trial on the operating while revoked charge in violation of Wisc. Stat. § 343.307(2) in Circuit Court Case No. 14CM 52 which is presently before this court on appeal and a hearing to see if the defendant's refusal was improper under Wisc. Stat. § 343.305(9)(a)(5) which is not before this court. For the operating while revoked court trial, the state only had to prove the following elements:

1. That the defendant operated a motor vehicle on a highway.

2. That the defendant's operating privilege was duly revoked at the time the defendant operated a motor vehicle.

3. That the defendant knew his operating privilege had been revoked.

4. That the revocation resulted from an offense that may be counted under section 343.307(2).

Wisconsin Criminal Jury Instruction 2621 Operating While Revokes: Criminal Offense: Revocation Resulted from an OWI-Related Offense.

Accordingly, the credibility of Officer Hurda's testimony regarding the consensual nature of the second stop was not an issue at the court trial. If it was relevant at all, it would only have been relevant for the refusal portion of the hearing which is not before this court. The defendant's appeal on the refusal hearing was appropriate dismissed by this court for lack of jurisdiction and this court should not allow the defendant to do a run around that dismissal.

Even if the court was to consider the defendant's argument regarding the credibility of Officer Hurda, his argument would fail.

> It is the function of the trier of fact, and not [an appellate] court, to resolve questions as to the weight of testimony and the credibility of witnesses. This principle recognizes the trial court's ability to assess each witness's demeanor and the overall persuasiveness of his or her testimony in a way that an appellate court, relying solely on a written transcript, cannot. Thus, we consider the trial judge to be the "ultimate arbiter of the credibility of a witness," and will uphold a trial court's determination of credibility unless that determination goes against the great weight and clear preponderance of the evidence.

State v. Hughes, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621 (citations omitted). *See also* *State v. Jenkins*, 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24 ("On review of the circuit court's decision, we apply a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact. The standard also applies to credibility determinations." (citation omitted)); *State v. Herro*, 53 Wis. 2d 211, 215, 191 N.W.2d 889 (1971) ("when the trial court makes findings of fact as to the credibility of witnesses and the weight of testimony, even in cases involving constitutional principles, this court will not upset those findings unless they are against the great weight and clear preponderance of the evidence, assuming the trial court adopted adequate procedures, as here, to try the issues").

Accordingly, the court should not consider the defendant's second argument.

C. THERE IS CIRCUMSTANTIAL EVIDENCE THAT THE DEFENDANT OPERATED HIS MOTOR VEHICLE ON A STATE HIGHWAY

The defendant's only viable argument is whether or not there was sufficient evidence to convict him of operating while revoked. A conviction may be supported solely by circumstantial evidence, and in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *State v.*

Poellinger, 153 Wis. 2d. 493, 501-02, 451 N.W.2d 752 (1990). In reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, this court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *Id.at 507.*

There was sufficient evidence to convince the circuit court, as the trier of fact, that the defendant drove his motor vehicle on a highway beyond a reasonable doubt – the only element contested by the defendant. Officer Hurda was dispatched to 133 North Spring Street in the City of Port Washington at approximately 10:25 p.m. for a vehicle in a driveway that was not normally used with the engine running. (R 48:6 lines 4-14;R-App 18) When Officer Hurda arrived at that location, he saw fumes coming out of the exhaust pipe. (R48:8 line 8;R-App 19) Officer Hurda identified the defendant as the person sitting in the driver's seat of the vehicle. (R 48:8-9 line 20-25 and 4-9;R-App 19-20) Officer Hurda identified the passenger in the vehicle as a person who lived at the residence. (R 48:9 lines 16-20:R-App 20) The vehicle was titled to the defendant and had been titled that day. (R 48:14 lines 9-10;R-App 21) When Officer Hurda asked the defendant if he had a revoked license, the defendant became silent and his shoulders slumped. (R48:15 line 1-3;R-App 22) When Officer Hurda questioned the passenger, Thomas Kassouf, if he had driven there the defendant responded that he didn't drive there. (R 48:16 lines 3-15;R-App 23) Thomas Kassouf testified that he spoke with the defendant about coming to visit him in Port Washington. (R48:60 line 9-12;R-App 25) Mr. Kassouf testified that the defendant lived in Milwaukee. (R48:60 line 3-5;R-App 25) Mr. Kassouf testified the defendant telephoned him to let him know he had arrived at his residence. (R 48:60 line 13-14;R-App 25) Mr. Kassouf testified when he got outside he saw the defendant parked in his driveway and that he did not see anyone else in the vehicle or walk away from the vehicle. (R48:59- 60 lines 15-16 24-25 and 1-2;R-App 24-25) Mr. Kassouf admitted that he did not drive the vehicle to the residence and believed the defendant had driven there. (R 48:61 lines 14-23;R-App 26)

Viewing the facts in favor of the state, the trier of fact could conclude beyond a reasonable doubt that the defendant drove his vehicle from Milwaukee to Port Washington to visit his friend Mr. Kassouf. The trier of fact could draw this conclusion based on the defendant's change of demeanor when asked by Officer Hurda if his license was revoked. If the defendant had not driven the vehicle to the location why would he react when being confronted about his revoked license. The trier of fact could further logically conclude the defendant drove his vehicle to Mr. Kassouf's house based on common knowledge and experience – vehicles do not simply materialize at someone's house. They have to be driven to that location.

CONCLUSION

Accordingly, the court should affirm the conviction.

Respectfully submitted,

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. State § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,479 words.

Dated this 15th day of May, 2015.

_____
Patti Wabitsch
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of May, 2015.

_____
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Assistant District Attorney